No. 3920.

United States Circuit Court of Appeals

For The Ninth Circuit

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation, and MARYLAND CASUALTY COMPANY, a Corporation. *Appellants,*

vs.

KELSO STATE BANK, an Insolvent Banking Corporation, and JOHN P. DUKE, as Supervisor of Banking of the State of Washington, in Charge of and Liquidating the Assets of the KELSO STATE BANK, *Appellees.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON
HON. R. S. BEAN, *District Judge.*

APPELLANTS' REPLY BRIEF

MCCAMANT & THOMPSON,
Northwestern Bank Bldg., Portland, Ore., and
GRINSTEAD & LAUBE,
314 Colman Bldg., Seattle, Washington,
Solicitors for Appellants.
WALLACE MCCAMANT, Portland, Oregon, and
LOREN GRINSTEAD, Seattle, Washington,
Of Counsel.

THE ARGUS PRESS, SEATTLE

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APPELLANTS' REPLY BRIEF

Appellees have served their brief in the above case. This brief contains many statements relative to evidence but does not contain a single reference to the pages of the record in support of the state-

ments made. We desire to call the court's attention to the following provisions of Rule 24:

"2. This brief (appellants') shall contain in the order here stated—

(c) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, *with a reference to the pages of the record and the authorities relied upon in support of each point.*

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief * * *. *His brief shall be of a like character with that required of the plaintiff in error or appellant*, except that no specification of error shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and, *when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.*"

Rule 24, U. S. Cir. Ct. of App. 9th Cir. 231 Fed. vi.

We believe the court should enforce the above rule in the instant case and refuse to consider the brief of the appellees or to hear counsel for appellees on oral argument.

The brief filed by the appellees contains many

statements which are not supported by the evidence, but, because there is no reference made to the pages of the record, it is impossible to turn to any particular page to find out whether there is any testimony which might support the claim made by the appellees. For example, on page 12 of their brief the appellees state that "none of the officers connected with the bank knew of its embarrassed condition but the Cashier." On pages 40 and 41 of said brief the statement is made that the Assistant Cashier "was as familiar with the condition of the bank and the business transaction as was the Cashier." Neither of these statements is supported by any reference to the record, but it is apparent that one of them is in error.

Should the court consider appellees' brief, the following is offered in reply to such points as are not covered in appellants' opening brief.

The argument on page 32 of Appellees' brief to the effect that the contract of pledge was not completed is answered on page 41 of Appellants' brief.

The uncontradicted evidence is that the warrants were delivered and that the pledgor could not have recovered them without obtaining a release from the County Treasurer. (R. 174, 175).

The control and dominion of the pledged property had passed from the pledgor into the absolute control and dominion of the pledgee, which is the test of a pledge.

Hastings v. Lincoln Trust Co., 115 Wash. 492; 197 Pac. 627.

On pages 35 and 36 of their brief, appellees argue that appellants should not recover the warrants on the theory that they were pledged to secure a past indebtedness, as that would be allowing a preference contrary to the decisions of the Supreme Court of the State of Washington. The contract of pledge was made in the State of Oregon (R. 163-166). Its validity must be determined by the laws of the place where made.

13 C. J. 248, 253.

Jamieson v. Potts, 55 Ore. 292, 300; 105 Pac. 93; 25 L. R. A. (N. S.) 24.

The trust fund doctrine, as applicable to the assets of a corporation which is a going concern, does not obtain in the State of Oregon and a corporation in the State of Oregon may prefer one creditor over another.

Garetson-Hilton Lumber Co. v. Hinson, 69 Oregon 605; 140 Pac. 633, and cases cited therein.

See also:

Peoples Bank v. Rostad, 86 Ore. 695, 702; 169 Pac. 347, 349.

On pages 38 to 45 of their brief, appellees make some argument that appellants, by presenting claims, made an election of remedies. When the claims were presented, the appellants' agent, who presented the same, did not know when the deposits had been made or the condition of the bank at the time the deposits were made, and made no investigation, except as to the amount on deposit by the

County Treasurer. (R. 193, 194). He knew nothing of the warrants. (R. 195). Such being the case, he could not and did not know that there was any possibility that appellants had any other remedy than to present their claims to the officer liquidating the bank. Not knowing anything about the warrants, he could not have known that the moneys deposited by the County Treasurer had been used in repurchasing the same; and, regardless of the circumstances under which the deposit was made, unless appellants knew what had become of the money, they would not know that there was any chance of tracing the same.

The law relative to election of remedies is stated in *Corpus Juris* as follows:

> "In order to constitute a binding election the party must, at the time the election is alleged to have been made, have had knowledge of the facts from which the coexisting, inconsistent remedial rights arise, since any position taken by a party before knowing all of the facts should be classed as a mistake and not as an election. If a party acts in ignorance of material facts, he may, when informed, adopt a different remedy, even though inconsistent, unless of course, the rights of innocent persons have intervened; * * *."
>
> 20 C. J. 35, 36.
>
> "An election between two remedies necessarily implies knowledge that there are two remedies, and in the absence of circumstances

constituting an estoppel, an election made by a party under a statement of facts, or a misconception as to his rights, is not binding in equity, and this is true whether the mistake is one of law or one of fact."

20 C. J. 37.

The precise question presented in this case was decided contrary to the contention of the appellees in the following cases:

Standard Oil Co. v. Hawkins, 74 Fed. 395.

Graybill v. Corlett (Colo.), 154 Pac. 730.

In re Stewart, 178 Fed. 463, 468.

On pages 40 and 41 of their brief, appellees argue that the Assistant Cashier of the Kelso State Bank was an agent of the appellants and that his knowledge was the knowledge of the appellants. This argument is not sound for several reasons. The Assistant Cashier was not an agent of the appellants or either of them. He was only a local agent of Hansen and Rowland, agents for appellants. He merely solicited business for appellants' agent and had no authority to act in connection with the investigation of claims, the presentation of claims, or making settlement of claims. (R. 195, 196). Furthermore, he did not act or purport to act as agent for appellants or for Hansen & Rowland in connection with the investigation of this case or the presentation of claims. He did not talk to appellants' agent about the failure of the Kelso State

Bank until several months afterwards, and then did not give any information which would have advised appellants or their agent of the facts upon which the present action is based. (R. 194). Being Assistant Cashier of the bank which had failed, he was acting for the bank and not for appellants, and it is clear that the appellants can not be charged with any knowledge which he possessed, unless the same was communicated to them. Furthermore, there is no evidence that he knew anything about the warrants having been repurchased with money deposited by the County Treasurer, or that the deposits could be traced.

There is no evidence that the County Treasurer knew, prior to the time his claim was paid and he made the assignment to appellants, or at any other time prior to the trial, that the warrants in question had been repurchased with moneys deposited by him after the bank was hopelessly insolvent, or that he ever knew that the bank was hopelessly insolvent when his deposits were made.

The dividend accepted by the Maryland Casualty Company was accepted prior to the commencement of this action, by the agent who had presented the claims, and neither said agent or the Maryland Casualty Company had any knowledge at that time in addition to the knowledge they had when the claim was presented. The dividend of the Fidelity & Deposit Company was turned over by the Super-

visor of Banking with the express understanding that the accepting of the same should not prejudice said appellant in the present action. (R. 276, 278).

Respectfully submitted,
McCAMANT & THOMPSON,
GRINSTEAD & LAUBE,
Solicitors for Appellants.

WALLACE McCAMANT and
LOREN GRINSTEAD,
Of Counsel.